In the

United States Court of Appeals

For the Ninth Circuit

JAMES F. CRAFTS, *Appellant*,

v.

FEDERAL TRADE COMMISSION, *Appellee*.

No. 14972

ON APPEAL FROM AN ORDER ENFORCING SUBPOENA

Brief for the Insurance Commissioner of the State of Washington and the Attorney General of the State of Washington, as Amici Curiae.

DON EASTVOLD,
Attorney General,

BERNARD G. LONCTOT,
Chief Assistant Attorney General,

J. CALVIN SIMPSON,
Assistant Attorney General,

Attorneys for Amici Curiae.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

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INTRODUCTION

In deciding the above entitled cause, this Court may find it necessary to determine an issue of law which, in the opinion of *amici curiae*, is of primary concern to the State of Washington. To assist the Court in making this determination the Insurance Commissioner of the State of Washington requested the Attorney General to file an *amicus curiae* brief explaining the interest of the State in the cause now before the Court and expressing the views of the State respecting the legal question involved.

In such cases we have been advised that this Court, following the practice of the United States Supreme Court, allows the State Attorney General to file an *amicus curiae* brief without having previously secured the Court's permission to do so. Accordingly, this brief is filed in the above entitled cause.

Appellant, who is the president of Fireman's Fund Indemnity Company, a California corporation, opens his reply brief with the following statement and question:

> "The primary issue in this case involves Public Law 15, 79th Congress (sometimes called the 'McCarran Act'), which says that the Federal Trade Commission Act is applicable to the business of insurance 'to the extent that such business is not regulated by State law.' Query: Does the Federal Trade Commission have jurisdiction over advertising of accident and health insurance in any state where such advertising is 'regulated by State law'?"

The State of Washington is vitally interested in the determination of this issue in so far as it pertains to Federal Trade Commission regulation of advertising practices carried on within this State by out-of-state insurance companies authorized to do business in Washington. Fireman's Fund Indemnity Company is permitted to carry on the business of insurance in Washington. In so doing, the company advertises its health and accident policies in this State. The State of Washington seeks to protect what it regards as its exclusive jurisdiction under

the McCarran Act to regulate such advertising in Washington.

In pursuance of this vital state interest, *amici curiae* will argue that under the terms of the McCarran Act appellee has not been empowered by the Congress to regulate insurance advertising in any State which has enacted laws regulating such advertising. Inasmuch as the State of Washington has enacted laws regulating the advertising practices of insurance companies doing business in this State, we contend that the Federal Trade Commission has no jurisdiction to regulate such advertising in Washington.

For purposes of this brief we feel that the legitimate interest of the State of Washington is confined to the issue involving the effect of the McCarran Act. For this reason *amici curiae* express no opinion upon any other question in this case.

STATEMENT OF THE QUESTION INVOLVED

In view of the laws of the State of Washington regulating insurance advertising, does the Federal Trade Commission have jurisdiction to regulate advertising within the State of health and accident policies issued by out-of-state insurance companies authorized to do business in the State of Washington?

ARGUMENT

I.

Where a State has enacted laws regulating insurance advertising, the McCarran-Ferguson Insurance Regulation Act makes it plain that the Federal Trade Commission is without jurisdiction to regulate such advertising in that State.

Under Section 2(b) of the McCarran-Ferguson Insurance Regulation Act, Public Law 15, 79th Congress (59 Stat. 33, 61 Stat. 448, 15 U. S. C. 1011 through 1015), hereafter called the McCarran Act, the Federal Trade Commission Act (38 Stat. 722, 15 U. S. C. 41, *et seq.*), was made "applicable to the business of insurance to the extent that such business is not regulated by State law." *Amici curiae* contend that under the McCarran Act the test of the Federal Trade Commission's power to regulate any phase of the insurance business is simply whether or not the matter sought to be regulated by the Commission is subject to regulation under the existing laws of the State involved. For example, if an insurance company in advertising its health and accident policies in Washington resorts to false, deceptive or misleading statements, such advertising is subject to Federal Trade Commission regulation only in the event that the laws of the State of Washington contain no provision regulating the use of insurance advertising within this State. We think this is the plain meaning of the McCarran Act.

There can be no doubt that Congress enacted the

McCarran Act to settle the confusing problems confronting state regulatory agencies and insurance companies as a result of the United States Supreme Court's decision in *United States v. South-Eastern Underwriters Association et al.*, 322 U. S. 533, 64 S. Ct. 1162; 88 L. Ed. 1440 (1944). In that case the Supreme Court held that insurance was commerce, thereby overruling its decision to the contrary in *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357 (1869), which had prevented Federal regulation of insurance for a period of seventy-four years.

During that long period many of the States had enacted comprehensive legislation in the public interest regulating the conduct of insurers doing business in those States. By the time the *South-Eastern Underwriters* decision was handed down, state regulation of insurance had become firmly established. Moreover, there was no constitutional impediment or barrier to state regulation inasmuch as insurance had not theretofore been considered as commerce. Since the commerce clause had no application to insurance, there was no necessity to determine whether a certain phase of the insurance business was to be characterized either as interstate or intrastate commerce. The applicability of state regulatory legislation hinged only upon a simple finding that the matter sought to be regulated had a necessary relationship to the conduct of an insurer doing business in the State involved.

With the advent of the *South-Eastern Under-*

writers case, however, there arose a number of perplexing problems in determining the extent to which the States could continue to regulate the insurance business. If a given matter was found to be a transaction in interstate commerce, could the States regulate that matter even in the absence of Federal legislation applicable to the same subject? What if the matter were found merely to "affect" interstate commerce? Questions of this kind had now become of crucial importance to insurance companies as well as to state administrators charged with the duty of enforcing state regulatory laws.

To settle the confusion resulting from the *South-Eastern Underwriters* decision, and, indeed to eliminate the vexing constitutional problems caused thereby, Congress passed the McCarran Act which opens with the following language:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

This statement indicates quite clearly that Congress, despite the opportunity afforded it by the *South-Eastern Underwriters* case, decided to reject the possibility of enacting Federal legislation comprehensively regulating insurance. Instead regulation un-

der State law was to be continued unhampered by any constitutional inhibitions that might be thought to exist as a result of Congress' silence respecting regulation of the interstate aspects of the insurance business. Thus the McCarran Act was designed to give support to the existing systems of state regulation and to relieve the States from the necessity of grappling with the complexities arising under the commerce clause as a result of the *South-Eastern Underwriters* decision. Section 2 of the Act therefore provided in part:

> "(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate the regulation or taxation of such business.
>
> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, * * * ."

However, Congressional silence regarding the regulation of insurance was not to be complete. Inasmuch as at the time the McCarran Act was passed some States had no legislation regulating the business of insurance, Section 3(a) of the Act in effect extended to the States a period of approximately three years to enact regulatory legislation. During that period certain previously enacted Federal regulatory statutes of application to business generally, such as the Federal Trade Commission Act, were made inapplicable to the business of insurance. At the expiration of this moratorium period, the Federal Trade Commission Act, in addition to other stat-

utes specifically mentioned, was made applicable by section 2 (b) of the McCarran Act to the insurance business "to the extent that such business is not regulated by State law." Thus, with two other exceptions unimportant to any issue under consideration in this brief, regulation of insurance by the Federal Trade Commission was limited by Congress to matters left unregulated under applicable state laws.

Amici curiae submit that the foregoing statement of the jurisdiction of the Federal Trade Commission over the business of insurance is supported by the legislative history of the McCarran Act as well as by the plain language of the Act itself. Our contention that the Commission's power to regulate insurance is limited to matters left unregulated by the laws of the particular State in question also finds support in the decisions of the United States Supreme Court relating to the purpose and effect of the McCarran Act. *Prudential Insurance Company v. Benjamin*, 328 U. S. 408, 66 S. Ct. 1142, 90 L. Ed. 1342 (1946); *Maryland Casualty Company v. Cushing*, 347 U. S. 409, 74 S. Ct. 608, 98 L. Ed. 806 (1954); *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 348 U. S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955).

We believe the Supreme Court's decision in *Prudential Insurance Company v. Benjamin, supra*, constitutes a complete and wholly sufficient answer to the position taken by a bare majority of the Federal Trade Commission in the *American Hospital*

and Life Insurance Company case (Federal Trade Commission Docket, No. 6237, April 24, 1956, printed in Appellant's Reply Brief, Appendix, pp. 24-76) that the Commission has concurrent jurisdiction under the McCarran Act to regulate insurance advertising whether or not there are state laws applicable to the regulation of that subject matter. In this connection, it is noteworthy that the majority opinion simply ignores the *Prudential Insurance Company* case. We agree without qualification with the views expressed by Commissioner Gwynne and Commissioner Mason in their joint dissenting opinion in the *American Hospital* case. As this dissenting opinion points out, concurrent jurisdiction would restore the confusion which followed the *South-Eastern Underwriters* decision and therefore subvert Congress' purpose in passing the McCarran Act.

Amici curiae insist that the Federal Trade Commission has no jurisdiction, concurrent or otherwise, under the McCarran Act to regulate the business of insurance where applicable state laws exist to regulate the matter under consideration. On the contrary, the Act makes it plain that the Commission's jurisdiction is limited to those instances where state law has left the matter unregulated. Thus in determining whether the Commission has jurisdiction over the advertising practices employed in Washington by out-of-state insurance companies doing business in the State of Washington, the only relevant question to be decided in view of the terms of

the McCarran Act is whether the laws of Washington provide for regulation of such advertising in this State.

II.

Advertising employed in the conduct of the business of insurance in Washington is regulated by the laws of the State of Washington.

During the moratorium provided for by Section 3(a) of the McCarran Act, the legislature of the State of Washington enacted chapter 79, Laws of 1947 (chapters 48.01 to 48.36 and chapter 48.48, Revised Code of Washington), which constitutes an insurance code designed to regulate in a comprehensive manner the many and varied aspects of the business of insurance conducted in our State. As provided by RCW 48.01.020, this code governs "all insurance and insurance transactions in this State, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith."

The following provisions of the Washington insurance code amply demonstrate that insurance advertising in Washington is regulated by the laws of Washington.

RCW 48.30.040 provides:

> "No person shall knowingly make, publish, or disseminate any false, deceptive or misleading representation or advertising in the conduct of the business of insurance, or relative to the business of insurance or relative to any person engaged therein."

RCW 48.30.050 provides:

"Every advertisement of, by, or on behalf of an insurer shall set forth the name in full of the insurer and the location of its home office or principal office, if any, in the United States (if an alien insurer)."

RCW 48.30.060 provides:

"No person who is not an insurer shall assume or use any name which deceptively infers or suggests that it is an insurer."

RCW 48.30.070 provides:

"(1) Every advertisement by or on behalf of any insurer purporting to show its financial condition may be in a condensed form but shall in substance correspond with the insurer's last verified statement filed with the commissioner.

"(2) No insurer or person in its behalf shall advertise assets except those actually owned and possessed by the insurer in its own exclusive right, available for the payment of losses and claims, and held for the protection of its policyholders and creditors."

RCW 48.30.080 provides:

"No person shall make, publish, or disseminate, or aid, abet or encourage the making, publishing, or dissemination of any information or statement which is false or maliciously critical and which is designed to injure in its reputation or business any authorized insurer or any domestic corporation or reciprocal being formed pursuant to this code for the purpose of becoming an insurer."

RCW 48.30.090 provides:

"No person shall make, issue or circulate, or cause to be made, issued or circulated any

misrepresentation of the terms of any policy or the benefits or advantages promised thereby, or the dividends or share of surplus to be received thereon, or use any name or title of any policy or class of policies misrepresenting the nature thereof."

RCW 48.30.010 provides:

"(1) No person engaged in the business of insurance shall engage in unfair methods of competition or in unfair or deceptive acts or practices in the conduct of such business as such methods, acts, or practices are defined pursuant to subsection (2) of this section.

"(2) In addition to such unfair methods and unfair or deceptive acts or practices as are expressly defined and prohibited by this code, the commissioner may from time to time by regulations promulgated only after a hearing thereon, define other methods of competition and other acts and practices in the conduct of such business reasonably found by him to be unfair or deceptive.

"(3) No such regulation shall be made effective prior to the expiration of thirty days after the date of the order on hearing by which it is promulgated.

"(4) The commissioner shall forthwith file a copy of every such regulation in the office of the county auditor of each county of this state.

"(5) If the commissioner has cause to believe that any person is violating any such regulation he shall order such person to cease and desist therefrom. The commissioner shall deliver such order to such person direct or mail it to the person by registered mail with return receipt requested. If the person fails to comply therewith before expiration of ten days after the cease and desist order has been received by him, he shall forfeit to the people of this state a

sum not to exceed two hundred and fifty dollars for each violation committed thereafter, such penalty to be recovered by an action prosecuted by the commissioner."

RCW 48.05.140 provides in part:

"The commissioner may refuse, suspend, or revoke an insurer's certificate of authority, in addition to other grounds therefor in this code, if the insurer:

"(1) Fails to comply with any provision of this code other than those for violation of which refusal, suspension, or revocation is mandatory, or fails to comply with any proper order of the commissioner."

In view of the foregoing provisions of the Revised Code of Washington, there can be no question that advertising employed in this State by Fireman's Fund Indemnity Company, or by any other insurer authorized to do business in Washington, is subject to regulation under the laws of the State of Washington.

CONCLUSION

Inasmuch as the laws of the State of Washington provide for the regulation of insurance advertising in this State; and inasmuch as section 2(b) of the McCarran Act declares that the Federal Trade Commission Act shall be applicable to the business of insurance "to the extent that such business is not regulated by State law," *amici curiae* submit that the Federal Trade Commission has no jurisdiction, concurrent or otherwise, to regulate advertising within the State of Washington of health and accident policies issued by out-of-state insurance companies authorized to do business in this State.

Respectfully submitted,

DON EASTVOLD,
Attorney General,

BERNARD G. LONCTOT,
Chief Assistant Attorney General,

J. CALVIN SIMPSON,
Assistant Attorney General,

Attorneys for Amici Curiae.